rule results naturally. *State v. Bohan*, 15 Kan. 418. Again the declaration sought to be introduced must concern the facts leading up to or causing or attending the injurious act in question. This rule excludes any narration that the declarant may attempt to state as to previous relations with the accused. His declarations are only admissible in so far as they explain the occurrence or fix the liability on some person. In *People v. Smith*, 172 N. Y., 242, the court in discussing the dying declarations introduced in that case, speaks of such declarations as admissible as part of the *res gestae*. It does not seem essential to the dying declarations now under discussion that they should be part of the *res gestae*. Statements of this nature to be admissible should undoubtedly explain the nature of the assault, but that they should accompany the act so closely as to be part of it would not seem to be an essential characteristic of this kind of evidence. Words which accompany and explain an act are admissible where the principal fact is admissible and no limitations are placed on them as is done in the case of dying declarations.

Another very important qualification to be noticed in this connection is that the declarant must have made the statements sought to be introduced with a realization and belief that death was inevitable. This qualification must be present, but it is not necessary that the person should really die soon after the making of the statements. *Com. v. Cooper*, 5 Allen 495. A declarant under these circumstances is as likely to tell the truth as if he were under the sanction of an oath. In fact, the fear of death supplies the office of the oath. *Tracy v. People*, 97 Ill. 106. The declarant must believe that dissolution will soon result, in order that full faith should be given his words. *State v. Welsor*, 117 Mo. 570. The trial court determines whether or not such fear exists in the mind of the declarant from all the circumstances of the case. *State v Cronin*, 64 Conn. 293.

A few courts manifest a tendency to apply these rules very narrowly. Especially in determining whether or not the declarant fear a speedy dissolution, have they been very particular and fine distinctions drawn which do not meet the approval of many of the students of evidence. Undoubtedly in many jurisdictions, the fact that the declarant, as in the principal case, said that he didn't know what his chances for recovery were, would be enough to exclude the evidence as not being made in fear of impending death, and it would seem that a strict application of these rules was wise, as the accused if deprived of many well recognized privileges by the admission of these statements under any conditions.

FEDERAL PRACTICE—WAIVER OF JURISDICTION—RECOUPMENT.

The United States Supreme Court, in the recent decision in *Merchant's Heat & Light Company v. J. B. Clow & Sons*, 204 U. S. 286, adds an important contribution to the law of pleading and practice in the Federal Courts.

The suit was brought in the United States Circuit Court for the Northern District of Illinois and was based on a breach of contract

entered into between plaintiff, an Illinois corporation, and defendant, a foreign corporation, of the State of Indiana. Service was had on an independent contractor in the employ of defendant, as superintendent of construction of defendant's plant in Indiana, but, at the time of service, in Illinois for the purpose of purchasing material for the said plant.

After the suit was begun, a motion to quash the return of service, on the ground that service was not such as to give the court jurisdiction, was made, and overruled, and thereupon the defendants, after excepting, appeared, as ordered, and pleaded the general issue and also asked a recoupment of damages under the same contract, and overcharges, in excess of the amount ultimately found due to the plaintiff.

Because not necessary to the decision of the case, the court did not consider whether or not defendant corporation was doing business in the State of Illinois, within the meaning of the Illinois statute, and consequently whether properly served, this question, so the court held, being concluded by the submission to jurisdiction which was disclosed by the pleadings. However, as the correctness of its holding may be questioned, in view of the fact that there is some doubt as to whether the defendant did actually submit to the jurisdiction absolutely, it is well to determine whether the service was good *ab initio*.

In order to authorize service upon an agent of a foreign corporation found within the state, such agent must be there doing business for his corporation. *Lumberman Insurance Company v. Meyor,* 197 U. S. 407. But every transaction in the state in the way of business will not authorize service; the business done must be something in the line of that for which the corporation was organized. *St. Clair v. Cox,* 106 U. S. 350.

Ordinarily, after a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on appeal is not lost by a subsequent appearance and defense to the suit upon the merits. *I. Foster's Federal Practice, 272; Harkness v. Hyde,* 98 U. S. 476.

But in this case the court took the view that the defendant, in pleading a recoupment, deprived itself of the right to appeal; that it went beyond a mere pleading to the merits and assumed the rôle of a plaintiff; that by seeking affirmative relief, it entered, not a defense, but a cross demand; that thereby it submitted to and invoked the jurisdiction of the court and waived absolutely the objections to jurisdiction first made. The decision, therefore, seems to depend entirely upon the nature of recoupment.

Recoupment is generally considered as being of common law origin, (*I. Chitty's Pleading,* 16 Am. Ed. 595) though it is more probable that it is a pure equity doctrine derived from the civil law, (12 Ark. 699). Recoupment is the right of the defendant to claim damages sustained by him, which grew out of matters set forth in plaintiff's complaint, or which arise from plaintiff's breach of contract on which the suit is founded, or from his violation of some duty imposed by the contract; and is different from set-off in that

its claim for damages is not enforced as an independent claim or debt due the defendant, but by way of reducing or destroying plaintiff's claim. *Grisham v. Bodman,* 111 Ala. 194. The doctrine is founded upon the fundamental idea that the action puts the whole contract in issue as it ought to do, and that no party to it should be allowed to recover upon a violation of a part, while his own breach of another part goes unredressed. (30 Ga. 415.) In other words, recoupment is merely a liberal and beneficial improvement upon the doctrine of failure of consideration, the gist of the defense being that the defendant does not owe the claim sued on because, in the transaction out of which the plaintiff's supposed cause of action arose, he has suffered such damages from plaintiff's violation of his obligations or omissions of duties in the premises, as reduce or destroy plaintiff's claim; and the effect and result of the plea of recoupment being sustained is an adjudication, that, to the extent of the sum recouped the plaintiff has no claim or debt against the defendant, and a judgment for defendant upon such plea is a judgment against the existence of the claim sued on. *Grisham v. Bodman,* 111 Ala. 194.

Where common law rules of pleading are in force, the defendant is allowed to recoup his damages by way of defense only, and is permitted to do no more than reduce, or at most wholly cancel, the plaintiff's claim, and his proper course is to bring a cross action rather than to recoup if he claims that his damages are greater than the plaintiff's whole demand. (52 N. H. 215.) At common law, should the defendant recoup more than the whole demand of plaintiff, a judgment in his favor was impossible, and he was held to be concluded from bringing a subsequent suit for the residue of his claim. In order to relieve himself of such a hardship, it was optional with the defendant whether he would plead a recoupment or bring a separate action. *O'Connor v. Varney,* 10 Gray 231.

Thus it is seen that at common law a recoupment was by way of defense only and not in the nature of a cross demand. Therefore, when by statute many of the states have provided that a defendant may get a verdict and a judgment in his favor by recoupment if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other, it does not seem, in fact, to be changing the nature of recoupment but merely doing away with the rigor and harshness of the common law rule.

Arising, as it does, out of the same transaction, and differing in this respect from the statutory plea of set-off, which arises out of matter separate from and independent of the transaction under controversy, it would seem that the plea of recoupment in the principal case is a mere defense and not such a new cross claim on the part of the defendant as to constitute an absolute submission to the jurisdiction of the court, and a waiver of all right of appeal on the matter of illegality of service, which right was reserved to the defendant in pleading to the merits.

The Supreme Court, however, held the plea of recoupment to be in the nature of a cross action, and therefore, the right of appeal lost to defendant, citing however, cases involving set-off proper and not recoupments.